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No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC., and INGERSOLL PICKUP INC.,

Petitioners,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA, and COUNTY OF HERKIMER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE SUSSEX COUNTY, VIRGINIA AND CHARLES CITY COUNTY, VIRGINIA IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae Sussex County and Charles City County are two predominantly rural counties located in Southeast Virginia.[1] Amici have an interest in this case because both

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae or their counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

counties contain economically efficient, state-of-the-art, and environmentally sensitive landfills that are used to dispose of substantial amounts of out-of-state solid waste. Revenues from these landfill operations constitute a significant proportion of both counties' total governmental revenues, which are used to fund needed public services for their citizens. Amici are concerned that the decision below, if affirmed by this Court, would cause localities throughout the country to enact similar protectionist measures in an effort to hinder the free flow of interstate commerce. Such a development would threaten the viability of the existing interstate waste disposal market, which in turn would harm amici, their citizens, and all other jurisdictions with waste disposal facilities that depend on this interstate commerce. Amici therefore urge this Court to reaffirm its decision in *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383 (1994), and confirm that localities cannot stifle interstate commerce to serve their own parochial, protectionist economic interests.

Founded in 1754, Sussex County is a largely rural county located about 45 miles southeast of Richmond, Virginia. Approximately 12,500 people live in Sussex County and it covers 491 square miles of land. The county's population density is only 26 people per square mile, and the median household income is just over $30,000. *See* U.S. Census Bureau, 2000 Census. Its economy is largely based on agriculture and agriculture-based manufacturing. Sussex County also contains a large commercial landfill, which occupies 1,315 acres, approximately 374 of which are active. The site has the capacity to hold approximately 137 million additional tons of waste material, making it the second largest landfill in the nation in terms of remaining capacity. *See* Waste News, *Top 25 Largest Landfills* (http://www.wastenews.com/rankings/land fills_cap2004.html). Approximately 86% of the waste disposed of at the site is from other states.

Incorporated in 1634, Charles City County is a largely rural county located just east of Richmond. Approximately 7,000

people live in Charles City County—an increase of only 1,334 people since the Nation's first census in 1790—and it covers approximately 183 square miles of land. The county's population density is approximately 38 people per square mile, and the median household income is just over $42,000. *See* U.S. Census Bureau, 2000 Census. Like Sussex County, Charles City County contains a large commercial landfill. This landfill spans 934 acres, and has the potential for 45 million cubic yards of waste material. *See* Virginia Dep't of Envtl. Quality, *Report on the Management of Municipal Solid Waste in the Commonwealth of Virginia* 86 (Nov. 1998) (hereinafter "*Virginia MSW Report 1998*"). Approximately 60% of the waste currently disposed of at the site is from other states.

Recognizing the significant losses likely to result from state and local limits on interstate trade in municipal solid waste ("MSW"), Charles City County has previously opposed flow control laws. When Virginia sought to curb the import of MSW into its borders by placing caps on the amount that could be received at landfills in the Commonwealth and limits on the method of transporting MSW, Charles City County and other plaintiffs filed suit. Applying this Court's strict scrutiny analysis for statutes that facially, or in their practical effect, discriminate against interstate commerce, the Fourth Circuit upheld the invalidation of several of the challenged statutes. *See Waste Management Holdings, Inc.* v. *Gilmore*, 252 F.3d 316 (4th Cir. 2001), *cert. denied*, 535 U.S. 904 (2002).

SUMMARY OF ARGUMENT

In response to market forces, a vibrant interstate market for the processing and disposal of municipal solid waste has grown up in the wake of this Court's decision in *Carbone*. The number of states exporting municipal solid waste has risen from only fourteen prior to *Carbone* to virtually all states today. Because this interstate market is sensitive to

local restrictions on the export of waste, it is important for there to be legal certainty regarding the unlawfulness of flow control ordinances. If, as the Second Circuit held, jurisdictions can evade *Carbone* simply by taking title to local disposal facilities, investment in interstate facilities will be deterred and the national market in waste disposal will likewise be hindered.

In its decision, the Second Circuit relied to some degree on its understanding that "out-of-state processors * * * have not complained," about respondents' ordinances and that "there is no indication the deprivation [of interstate commerce] represents a meaningful economic loss." Pet. App. 48a. Amici have therefore filed this brief to make clear that there *are* in fact out-of-state interests opposed to flow control ordinances, and that this curtailment of interstate commerce—particularly if replicated throughout the nation—will in fact result in a meaningful economic loss for out-of-state disposal facilities that depend on interstate commerce. Just as there were governmental entities opposed to the ordinance struck down in *Carbone*, 511 U.S. at 384 n.*, so too are there governmental entities opposed to the essentially identical restrictions at issue in this case. If amici and similarly situated jurisdictions cannot be assured of the volume of interstate shipments needed to render their facilities economically viable, there will be an incentive for them to retaliate by similarly hoarding their own local waste. The Commerce Clause was intended to prevent just such interstate trade wars.

Where, as here and in *Carbone*, Congress has not clearly approved of discriminatory flow control measures, this Court's precedents require invalidation of such restrictions on interstate commerce, regardless of whether they favor private or publicly owned facilities. If localities still desire to enact such ordinances, they are free to continue to seek approval from Congress—approval that Congress has so far declined to provide. In the meantime, however, this Court should reaffirm *Carbone*, which has provided critical legal

certainty for amici and other jurisdictions that have invested in, and depend on, this interstate commerce.

ARGUMENT

I. THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE AND MARKET FORCES HAVE FOSTERED A VIBRANT INTERSTATE MARKET IN WASTE PROCESSING AND DISPOSAL.

In 1978, this Court held that the Commerce Clause prevents the individual states from unjustifiably burdening the interstate market for the disposal and processing of municipal solid waste. *See Philadelphia* v. *New Jersey*, 437 U.S. 617, 629 (1978) (state may not claim the right to seal its borders to interstate traffic in waste). Since then, this Court has continually invalidated state and local attempts to prohibit, hinder, or discriminatorily tax the import of waste into their jurisdictions. *See, e.g., Ft. Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992) (invalidating state and local laws that granted counties the option to prohibit import of solid waste); *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334 (1992) (Commerce Clause prohibits state from imposing a differential fee structure for imported hazardous waste); *Oregon Waste Sys. Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93 (1994) (striking down state statute that imposed an additional disposal fee for solid waste generated outside the state).

Twelve years ago, this Court rendered its landmark decision in *Carbone*. Applying "well-settled principles of * * * Commerce Clause jurisprudence," 511 U.S. at 386, the Court invalidated a flow control ordinance requiring that all waste generated within a town's borders be processed at a specific facility designated by the town. *Id.* at 394-95. That facility was in all relevant respects a public facility, since the municipality had agreed to amortize its cost through the flow control ordinance, and to purchase the facility for one dollar after five years. *Id.* at 386. Noting that the Commerce

Clause "presumes a national market free from local legislation that discriminates in favor of local interests," the Court made clear that the Constitution mandates the "unobstructed flow of interstate commerce" except in the rarest of circumstances. *Id.* at 393.

Carbone, and the decisions that preceded it, have fostered a vibrant and growing interstate market for the processing and disposal of solid waste. Freed of discriminatory and protectionist attempts to prevent the import and export of waste, market forces have served to accommodate the increasing volume of waste in an economically efficient and environmentally sensitive manner. The market for processing and disposal of MSW is driven by a number of factors, such as the state of the national economy, transportation costs, reuse and recycling rates, environmental laws, and local factors such as climate and commercial activity. *See, e.g.*, Richard C. Porter, *The Economics of Waste* 102-117 (2002) (hereinafter "*The Economics of Waste*"); EPA, *Municipal Solid Waste in the United States 2005*, at 11 (2006) (hereinafter "*MSW 2005*"). But the primary drivers of this market are the ever increasing amount of waste generated by society and the decrease in the number of suitable places to dispose of it.

In 2005, Americans generated 245.7 million tons of MSW, and that number continues to grow along with the population. *See MSW 2005*, *supra*, at 1.[2] At the same time, however, the number of available landfills is diminishing. Between 1993 and 2002, the number of United States landfills declined by 54%. *See* Congressional Research Service, *Interstate Shipment of Municipal Solid Waste: 2004 Update* 11 (2004) (citation omitted) (hereinafter "*CRS Report*"). Many of the closed sites were small public landfills. *See* Robert Burke,

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[2] Although the average rate of MSW generation per person has not shown a significant increase in the past few years, the volume generated in the United States is increasing, due in large part to the increase in the overall population. *See id.* at 4.

Cash For Trash, Virginia Business, Nov. 1998, at 3 (hereinafter "*Cash for Trash*"). These landfills closed because they reached their capacity, violated environmental laws, or could not compete with private landfills. *Id.*

Interstate commerce has met this market demand, fostered by this Court's constant vigilance in enforcing the Constitution's guarantee against local protectionist measures. After *Carbone*, the interstate market for processing and disposal of municipal solid waste expanded significantly. In 1989, only thirteen states and the District of Columbia exported MSW to another jurisdiction. *See* Edward W. Repa, *Interstate Movement of Municipal Solid Waste*, NSWMA Research Bulletin 05-2, at 6 (Jan. 2005) (hereinafter "*NSWMA Research Bulletin*"). And in that same year, only fourteen states imported MSW from other jurisdictions for disposal. *Id.* at 7. By 2003, however, it was an entirely different story. The amount of MSW exported and imported tripled between 1989 and 2003, with 47 states and the District of Columbia exporting MSW and 44 states importing MSW for disposal. *Id.* at 2, 6, 7.

Thus, virtually every state in the continental United States now participates in this interstate market, and nearly 10% of all MSW generated in the United States currently enters interstate trade. *See The Economics of Waste*, *supra*, at 103 (2002); *NSWMA Research Bulletin 05-2*, *supra*, at 2. This trade is extremely beneficial both for those jurisdictions that need a place to send their waste and for those that are positioned to accept it. In 2005, for example, ten counties in Virginia (including amici) reaped economic benefits totaling more than $42.9 million from the construction and operation of regional waste management facilities within their borders that accept MSW from out of state. *See* Virginia Dep't of Envtl. Quality, *Solid Waste Managed in Virginia During Calendar Year 2005*, at 30 (June 2006) (hereinafter "*Virginia MSW Report 2005*").

Just as the Framers envisioned, this Court's Commerce Clause jurisprudence has been instrumental in ensuring the continued growth of this interstate commerce. In the absence of protectionist measures, market forces will dictate where waste will be disposed, depending on which disposal site is the most efficient location for a particular shipment. For example, although Illinois more than doubled its landfill capacity between 1995 and 2003, the MSW generated in the Chicago metropolitan area is routinely exported to Indiana and Wisconsin, because it is more efficient for that waste to cross state lines. *See CRS Report*, *supra*, at 10. Similarly, Virginia is now a substantial importer of MSW, most likely because Virginia is near several large metropolitan areas, is readily accessible by road, rail, and water, and has land costs that are generally lower than in other states in the region. *See Virginia MSW Report 1998*, *supra*, at 87; *see also The Economics of Waste*, *supra*, at 103 (noting that the optimal distance of transporting waste for disposal is a function of the relative price of land and cost of transport). Additionally, the landfill disposal fees (tipping fees) charged by Virginia landfill operators are among the lowest in the region. *See Virginia MSW Report 1998*, *supra*, at 87.

Local fees and restrictions, however, have a significant effect on these market forces. These include both import and export restrictions. For example, although Pennsylvania remains the largest importer of MSW, the amount imported to that Commonwealth decreased when Pennsylvania imposed a new $5 per ton state fee on all waste disposed of within the state. *See CRS Report*, *supra*, at 7. Export restrictions likewise threaten the efficiencies engendered by interstate commerce. Flow control ordinances, by definition, disrupt the flow of interstate commerce. *See* National Economic Research Associates, *The Cost of Flow Control*, at 1-2 (May 1995) (hereinafter "*NERA Report*"). Flow control ordinances increase the average tipping fee by approximately $10 per ton, or 33%. *Id.* at 1. In the absence of flow control,

MSW would be shipped elsewhere to save on disposal costs. *Id.* at 2.

Because of their nature, large-scale regional landfills, like those in Sussex and Charles City counties, are often sited in rural but easily accessible areas that have small populations and low population densities. *See, e.g., Cash for Trash, supra*, at 2-3; *Virginia MSW Report 1998, supra*, at 86-87; *The Economics of Waste, supra*, at 102-103. These jurisdictions may be the most economically efficient and environmentally desirable sites for landfills. *See Virginia MSW Report 1998, supra*, at 86-88; *Interstate Transportation of Municipal Solid Waste: Hearing on S. 533, S. 663, and S. 872 Before the Sen. Comm. on Environment and Public Works*, 106th Cong., 1st Sess. 2 (1999) (statement of Sen. John Chafee) (hereinafter "*Senate Hearing*"); *NERA Report, supra*, at 5. Because these jurisdictions' own populations are small, however, their disposal facilities must depend for their economic viability on the continued availability of waste shipments from other areas. *See, e.g.*, Steve Webb, *Virginia County Misses: New York City Trash*, Waste Age, May 1, 1999; *Virginia MSW Report 1998, supra*, at 61-62.

Had *Carbone* been decided differently, many of these economically efficient regional facilities might never have been created. To be economically viable, MSW processing and disposal facilities require shipment volumes that many facilities, particularly those in rural areas, cannot meet with just their own waste. *See NERA Report, supra*, at 5. Flow control laws like the one invalidated in *Carbone* and the one at issue in this case are attempts by localities to disrupt the market's efficient allocation of resources. These laws hoard local waste at monopoly rates, at the expense of cheaper out-of-state facilities, in order to guarantee an economically beneficial volume that can support more expensive local facilities. *See id.*; *The Economics of Waste, supra*, at 110-11. When *Carbone* took the flow control option off the table, however, landfill operators were forced to compete in the

market. *See id.* at 111 (noting that "flow control is now a thing of the past"). The legal certainty provided by the Court has allowed the significant up-front investments needed for facilities, like those in Sussex County and Charles City County, that depend on interstate shipments. But market forces have also forced existing facilities to become more competitive. Although opponents of the ruling in *Carbone* suggested that numerous waste management facilities would go bankrupt without the ability to impose flow control, "the vast majority of facilities that previously relied on flow control have survived without it." *Senate Hearing*, *supra*, at 2 (statement of Sen. John Chafee).

The predictable result of prevailing market forces and this Court's continued safeguarding of interstate commerce has been the creation of large regional landfills and a concomitant increase in interstate shipment of MSW to those landfills. Although they may not have envisioned today's interstate commerce in waste disposal, this kind of uninhibited national market is precisely what the Framers intended. As Justice Jackson famously noted:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them.

H.P. Hood & Sons v. *Du Mond*, 336 U.S. 525, 539 (1949).

Amici have sited interstate waste disposal facilities in their jurisdictions predicated on the "certainty that [they] will have free access to every market in the Nation." *Id.* The Court should not disrupt that legal certainty by endorsing the Second Circuit's limitation of *Carbone* to laws favoring privately-owned facilities, for such a holding would effectively allow any jurisdiction to evade *Carbone* to the detriment of the national market and all those who depend on it.

II. ADOPTING THE SECOND CIRCUIT'S REASONING WILL ADVERSELY AFFECT AMICI AND OTHER JURISDICTIONS THAT HAVE DEPENDED ON THE LEGAL CERTAINTY PROVIDED BY *CARBONE*.

Contrary to the Second Circuit's understanding, upholding respondents' flow control ordinances will in fact result in "a meaningful economic loss," Pet. App. 48a, to amici and other jurisdictions with facilities that depend on the continued vitality of the interstate market in MSW processing and disposal. Amici will be particularly hard hit, since a significant proportion of their budgetary resources is derived from interstate commerce in waste disposal. Amici have depended on the safeguards provided by *Carbone*, and the Court should not abruptly remove them. If there are any remaining concerns about the propriety of flow control ordinances, respondents and other like-minded jurisdictions may continue to press their case in Congress, which has so far declined to endorse their protectionist proposals.

A. Landfills Accepting Interstate Waste Have Provided Substantial Economic Benefits To Amici And Their Citizens.

Sussex County. In 1994, Sussex County's two unlined landfills were nearly full and had to be closed. *See Cash for Trash*, *supra*, at 4. Additionally, closing those two landfills would cost the county more than $1 million. *Id.* To solve this problem, a commercial operator offered to build the county a state-of-the-art facility, one that exceeded state and federal environmental standards, and pay the county for each ton of waste disposed of at the new site. *Id.* In addition, the operator agreed to pay for half of the costs associated with closing Sussex County's old landfills and to build eight collection sites for county residents and businesses. *Id.*

Sussex County's decision to allow this regional landfill—which has the second largest capacity in the nation—has

been very beneficial for its citizens. In the past five years alone, the landfill has contributed nearly $30 million dollars to county revenues, and landfill fees currently account for 39% of total revenues. *See* County of Sussex Virginia, *Comprehensive Annual Financial Report for Fiscal Year Ended June 30, 2005*, at 60 (2005).

Charles City County. In the late 1980s, Charles City County had high real estate taxes and little private investment. *See Cash for Trash*, *supra*, at 3. The Commonwealth of Virginia demanded that the county's old landfill be closed due to newly enacted environmental regulations, but the cost of closing that landfill would require a large increase in the tax rate. *Id.*; *see also Senate Hearing*, *supra*, at 72 (statement of Floyd H. Miles, Sr., Chairman, Charles City County Board of Supervisors). The County therefore signed an agreement with a developer to develop a new commercial landfill, in hopes that the fees generated from those operations would help solve its fiscal dilemma. *See Cash for Trash*, *supra*, at 3. To induce a private company to develop the new landfill site, the County agreed that its new landfill would be open to MSW generated outside its borders. *See Senate Hearing*, *supra*, at 72 (statement of Floyd H. Miles, Sr.).

The deal paid off. Since the landfill began operations in 1990, Charles City County had collected over $40 million in payments as of 1999, *id.*, with an additional $16.5 million collected since then. Numerous other economic benefits have resulted. For example, the income has enabled the county to avoid imposing a gross receipts tax, which in turn has spawned development. *See Cash for Trash*, *supra*, at 3. In 1989, there were three companies in Charles City County's industrial park; by 1998, there were twenty-two. *Id.* Income generated from the landfill operations has enabled the county to completely replace its school facilities that were slated for loss of accreditation due the facilities' poor condition, to expand recreational programs for its citizens, and to provide much needed new office facilities for

the county government and the school board. *See Senate Hearing*, *supra*, at 72 (statement of Floyd H. Miles, Sr.).

Charles City County receives a substantial sum from its landfill operations. For the year 2005, the landfill in Charles City County generated approximately $2.7 million in revenue for the county. The average total economic benefit to the county derived from landfill operations is roughly $4 million annually, which represents approximately 15% of the county's annual budget.

The benefits of the Sussex and Charles City landfills also extend beyond their borders. Both facilities employ the latest technology and exceed both federal and state environmental standards. *See, e.g.*, *Senate Hearing*, *supra*, at 72 (statement of Floyd H. Miles, Sr.); *Cash for Trash*, *supra*, at 3; Warren Fisk, *Virginia Brings in Record Haul of Garbage*, The Virginian-Pilot, May 28, 2002. That is not surprising, since large facilities that accept substantial volumes of interstate waste—unlike many smaller local facilities—are designed to meet the highest environmental standards.[3] In fact, both counties' facilities have been deemed safe enough to accept poultry carcasses infected with avian influenza, thereby providing a critical service to localities that cannot dispose of this hazardous material themselves. *See* Calvin R. Trice, *Avian Outbreak Difficult to Stop*, Richmond Times-Dispatch, May 13, 2002, at B1.

Additionally, both counties operate landfill-to-energy facilities, which convert methane gas to electricity. *See, e.g.*, Lawrence Latane III, *Landfill Seen as Power Source*, Richmond Times-Dispatch, July 24, 2006, at B1; Matt Sabo,

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[3] *See Senate Hearing*, *supra*, at 1-2 ("Interstate waste shipments have increased * * * due largely to the closure of hundreds of small landfills [that] were unable to comply [with] new stringent environmental standards. As a result, waste may be crossing state lines, but it is ending up in facilities that meet the highest standards.") (statement of Sen. John Chafee).

County Could Benefit from Methane Sale, Daily Press, May 20, 2005, at C1. Most landfills simply burn off methane gas, but amici's larger facilities, due to their economies of scale, can use this unwanted landfill byproduct to generate electricity that is sold to utility companies to help meet peak demand. *See* Ingenco, *Green Power* (http://www.ingenco.com/grn.html) (noting that Charles City County site produces landfill gas energy equivalent to four million gallons of fuel oil); Virginia Dep't of Envtl. Quality, *Using Landfill Gas for Fuel and Energy* (Sept. 18, 2006) (noting that Sussex County's landfill-to-energy project enabled it to reduce its air emissions by more than 4,000 tons in 2004); Lawrence Latane III, *supra*, at B1. Converting unwanted methane gas to electricity also conserves nonrenewable fossil fuels: a single facility can produce the energy equivalent of 1.2 million barrels of oil while reducing the greenhouse gas emissions typically generated in energy production. *See* Tina McCloud, *Landfill Gas Will Profit Gloucester: Board OKs Methane Sale*, Daily Press, Apr. 3, 2003, at C1. A single landfill-to-energy facility is "the equivalent of planting 126,000 acres of trees." Matt Sabo, *supra*, at C1. This benefits the entire nation.[4]

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[4] The EPA estimates that between 60-90% of the methane gas emitted from a landfill may be converted to energy. *See* EPA, *Landfill Methane Outreach Program* (http://epa.gov/lmop/benefits.htm). Approximately 380 landfills nationwide are currently engaged in landfill-to-energy projects. *Id.* Because both size and the volume of waste received by a landfill affects its suitability for landfill-to-energy projects, amici's large regional landfills tend to be ideal candidates for landfill-to-energy facilities. *See* EPA, *Turning a Liability into an Asset: A Landfill Gas-To-Energy Project Development Handbook*, at 2-2 (1996). Without interstate commerce in MSW, however, it is unlikely that amici's landfills could maintain the volume of MSW necessary to ensure the economic viability of their landfill-to-energy operations. *See id.*

B. Amici And Their Citizens Would Be Harmed If Localities Could Evade The Holding In *Carbone* Simply By Taking Title To Processing And Disposal Facilities.

Both Sussex County and Charles City County depend on MSW that is shipped from out of state. Approximately 86% of the waste received at the Sussex County landfill originates from out of state. Consequently, approximately 86% of the revenue generated by that landfill is derived from out-of-state sources. The Charles City County landfill is similarly dependent on out-of-state MSW. Roughly 60% of the MSW received by that landfill—and a corresponding percentage of its revenue—is derived from sources out of state.

It bears noting that more than a quarter of the MSW imported into Virginia originated in New York, where respondents are located. *See Virginia MSW Report 2005*, *supra*, at i. Thus, even if only jurisdictions in New York were permitted to interfere with the export of MSW, the amount imported to Virginia would likely decrease significantly. If other jurisdictions receive this Court's approval to follow suit, the harm to amici could be enormous. For it will be a relatively simple task for all localities intent on securing monopoly profits from their commercially hauled waste to avoid the application of *Carbone* by simply taking title to their processing and disposal facilities. Just as in *Carbone*, obtaining financing for such transactions would be easy once the localities are assured that they can legally direct all local waste to those local facilities. As even the Second Circuit recognized, "[i]t is unquestionably the case that the interstate market for waste disposal services would suffer if numerous jurisdictions were to impose restrictions like these on private entities that engage in trash collection." Pet. App. 17a.

The potential impact on amici could be devastating. If the Sussex and Charles City County landfills cannot be assured of sufficient volumes of interstate MSW to render them econ-

omically viable, a major source of public revenues would be lost. As noted, landfill fees currently account for 39% of the revenues of the Sussex County government, and 15% of the revenues of the Charles City County government. If these revenues were to be lost or significantly diminished, the counties would either have to raise taxes substantially or curtail public services. Sussex County, for example, is in the process of securing financing for a new elementary school, which will cost about $23 million. That school, however, cannot be built without the assurance of continued landfill revenues, which in turn depend on the free flow of interstate commerce. Charles City County estimates that at its current tax rates it would need an additional $400 million in taxable private investment in order to generate tax receipts equivalent to the amount of income the county receives from its landfill operations. Both counties are also ill-equipped to handle even a temporary decline in their revenues, as each currently has reserves of only $1.5 million.

If this Court were to uphold respondents' ordinances, the other option for amici and other jurisdictions that depend on interstate waste disposal revenues is equally undesirable. Were amici faced with decreasing revenues resulting from the reduction in volume of MSW imported into Virginia due to flow control ordinances, they too might attempt to secure similar restrictions to ensure access to locally generated waste. Currently, Virginia exports approximately 241,000 tons of MSW each year to other states such as Georgia, Kentucky, Maryland, North Carolina, Pennsylvania, South Carolina, Tennessee, and West Virginia. *See NSWMA Research Bulletin 05-2*, *supra*, at 5. One can reasonably expect that Virginia localities would seek to curtail those exports if the localities were not able to rely on imports from other states. Moreover, the states to which Virginia exports MSW are themselves exporters of MSW. *Id.* For example, Georgia exports to Alabama, Illinois, South Carolina, Tennessee and Virginia. Alabama, in turn, exports to Florida,

Mississippi, and Tennessee. *Id.* These interstate MSW shipments "represent routine partnerships among states and municipalities." *Id.* at 9.

Flow control laws like the ones at issue in this case threaten such trading relationships, which is precisely the scenario the Commerce Clause was intended to prevent. The premise of the Commerce Clause is that the United States is "a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976) (citation omitted). As this Court noted in *Carbone*, "[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." 511 U.S. at 390 (citation omitted). Allowing respondents to circumvent *Carbone* would encourage these kinds of destructive retaliatory measures and foster the "economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979).

This Court, moreover, should be particularly reluctant to disrupt the interstate market and investment-backed expectations that have been fostered by the Court's decision in *Carbone*. By ruling out flow control measures that block interstate commerce, the Court's decision provided the legal certainty upon which investments could be predicated. As noted above, the entire interstate market in MSW disposal has grown by leaps and bounds since *Carbone*, in reasonable reliance on the safeguards that decision provided. The Court should not upset the settled expectations of the market by overruling *Carbone* or by effectively accomplishing the same thing through an exception that would allow the decision to be circumvented virtually at will. *See Quill Corp.* v. *North*

Dakota, 504 U.S. 298, 316-17 (1992) (declining to depart from prior precedent when to do so would upset settled expectations and noting importance of "stability and orderly development of the law") (internal citation omitted).

Adhering to the letter and spirit of *Carbone* is particularly appropriate because this Court is not the last word on this subject. Unlike its authority in other areas of constitutional law, Congress has "plenary and supreme authority" over interstate commerce. *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 423 (1946). This means that Congress can always limit the holding of *Carbone* if it desires, provided that it does so clearly and expressly. *See Quill*, 504 U.S. at 318. Congress has considered such legislation in every session since 1987, but has consistently declined to enact laws that permit state and local interference in the interstate MSW processing and disposal market. *See CRS Report*, *supra*, at 1. Respondents and their allies are free to continue these legislative efforts if they desire. But in the meantime, this Court should continue to adhere to its decision in *Carbone*, which has provided needed certainty to amici and other jurisdictions that benefit greatly from the uninhibited interstate trade that the Constitution envisions and *Carbone* has fostered.

CONCLUSION

For the foregoing reasons, and those set forth in petitioners' brief, the judgment of the court of appeals should be reversed.

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